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IN THE

# Supreme Court of the United States

**October Term—1961**

60 Civil Action No. 2067

MARÍA LUISA CRUZ de ORONA,
*Petitioner-Appellant,*
against
ANGELA ORONA, as Administratrix *de bonis non* of the Estate of Santiago Orona, deceased,
*Plaintiff-Respondent,*
against
ISBRANDSTEN COMPANY, INC., UNITED MAIL STEAMSHIP COMPANY,
*Defendants-Respondents.*

## PETITION FOR WRIT OF CERTIORARI FOR PETITIONER-APPELLANT AND APPENDIX

MILTON GARBER,
*Attorney for Petitioner-Appellant,*
1 Hoboken Street,
Newark, New Jersey.

KENNETH HELLER,
DONALD S. SHERWOOD,
277 Broadway,
New York 7, New York.
*Of Counsel.*

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# Supreme Court of the United States

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MARIA LUISA CRUZ de ORONA,
*Petitioner-Appellant,*

against

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*Plaintiff-Respondent,*

against

ISBRANDTSEN COMPANY, INC., UNITED MAIL STEAMSHIP COMPANY,
*Defendants-Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Maria Luisa Cruz de Orona, general guardian of Maria Orona prays that a Writ of Certiorari issue to review an order and judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter which denied the right of the petitioner to intervene as a matter of right in a wrongful death action against defendants brought pursuant to the Jones Act and The Death On The High Seas Act.

## The Opinions of the Courts Below

The Hon. John F. X. McGohey, United States District Judge for the Southern District of New York denied petitioner's leave to intervene as a matter of right pursuant to the intervention statute in this proceeding.

Thereafter, petitioner appealed to the United States Court of Appeals for the Second Circuit, which Court dismissed the appeal and rendered a decision upon the merits.

The opinions of the Courts below appear at Appendix "A".

## Jurisdiction

The decision and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on October 23rd, 1961.

This cause was brought under the Jones Act, the Death On The High Seas Act and is within the Admiralty and Maritime Jurisdiction of the United States and of this Honorable Court.

## Question Presented

Is petitioner entitled to intervene as a matter of right upon the ground that there is a conflict of interest between the Estate's representative and petitioner, and that by reason thereof the petitioner's interest will not be adequately or properly represented by the estate representative?

## Statement of the Case

Santiago Orona, deceased, was a seaman who suffered death on the high seas, leaving as survivors a dependent

infant and his mother, the petitioner herein, MARIA LUISA CRUZ de OROXA.

Petitioner herein brought an action in the United States District Court for the Southern District of New York, having petitioned the Public Administrator to appear as party plaintiff.

Thereafter, ANGELA OROXA moved for appointment as Administratrix of the Estate of the decedent, and was thereafter appointed and substituted as party plaintiff.

The right to recover damages in the case below depends upon the dependency of the survivors and the extent of their dependency upon decedent. The damages to be awarded will be determined proportionately.

The infant survivor is not the child of the Administratrix and therefore the present Administratrix would have no interest, familial or otherwise, to assure that the surviving dependent son obtains his full measure of damages in view of the fact that his recovery will impinge upon the amount that the Administratrix recovers. It is for this reason that the petitioner contends that there is a conflict of interest and the interest of the infant will not be adequately represented upon a trial of this action.

## POINT I

**The decisions below in denying intervention are violative of the purpose and intendment of the intervention statute, being Rule 21(a)(2) of the Rules of Civil Procedure.**

The decedent had left him surviving a minor child, MARIA OROXA with MARIA LUISA CRUZ de OROXA being the General Guardian of the infant.

There is a conflict of interests between ANGELA ORONA and decedent's child.

"The measure of damages in a Jones Act Death Action, 46 U. S. C., 688, is the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased, * * *." *Cleveland Tankers, Inc. v. Tierney*, 169 F. 2d 622.

The outside limit of damages is measured of course by the earning capacity of the decedent for dependent survivors could never have reasonable expectation of pecuniary benefits exceeding the earning power of a decedent.

Thus, in the case at bar, whatever right to damages decedent's lawful, albeit non-recognized widow, ANGELA ORONA may have in a recovery by virtue of her right to have demanded support, assuming she had not disenfranchised herself of such right by virtue of her own acts, her recovery will be diminished by the amount to which decedent's minor son will be entitled to recover,

*Seaboard Air Line Ry. v. Kenney*, 240 U. S. 489;
*Civil v. Waterman*, 217 F. 2d 94.

It must be noted that the defendant may be able to prove a difficult marriage to minimize the damages to which the widow might be entitled, *Naylor v. Isthmian S. S. Co.*, 187 F. 2d 538, thus enhancing the monetary award to the infant and guardian.

It is readily apparent, that the widow in the instant case will be more interested in proving her pecuniary loss to the detriment of the loss sustained by decedent's surviving minor child.

The conflict of interest is real and it is apparent that the interests of the surviving minor child will not be protected without direct representation on his behalf.

## POINT II

### The Court erred in failing to permit intervention.

Having, it is respectfully submitted, conclusively shown the conflict of interest between the estate representative and decedent's son, it must be apparent that the right to intervene is the sole protection the infant has to recover his just measure of damages.

It may be well to say that the estate representative and her counsel are bound to protect the interests of the infant by reason of their fiduciary capacity, but though the obligation may exist in law, it does not exist in fact.

The infant or his guardian should not be relegated to the necessity of further proceedings in Surrogate's Court or direct civil action against the estate representative and/or counsel after the trial, should it be shown that the fiduciary obligation was not met.

The infant will of course be protected should intervention be allowed, and the defendant of course will not be prejudiced where all those claiming an interest in the decedent's estate are before the Court in one proceeding.

It must be noted at the outset that the only party who might be remotely aggrieved by intervention is the defendant.

Defendant, however, has stated through its counsel in an affidavit dated April 3rd, 1961, that:

> "The defendant does not oppose the motion now before the Court to add MARIA LUISA CRUZ de OBONA as a party plaintiff in this action. • • •"

The defense of proper party plaintiff is personal to the defendant and if defendant has no objection to appearance

in the suit by one who is a general guardian representing a surviving minor then certainly another party claiming an interest in the recovery cannot be and certainly should not be heard to complain, particularly where as here, there is a substantial conflict of interest.

Assuming *arguendo*, that the widow was duly appointed the estate representative, that fact is not determinative as to who may be entitled to recover pecuniary damages under the statute.

Whatever presumptions which may exist in favor of the estate representative *vis-a-vis* defendant, *Cleveland Tankers, Inc. v. Tierney*, 169 F. 2d 622, *Civil v. Waterman SS Corp.*, 217 F. 2d 94, such presumption is not conclusive as to the amount or proportion of recovery to which she may be entitled, where as here the decedent recognized his son as a dependent and never acknowledged his estranged widow as a dependent wife. Here the defendant on his tax returns filed 22 days after the purported marriage and filed two years later listed the son as a dependent and MARIA LUISA CRUZ de ORONA as wife and not ANGELA ORONA.

The infant's interest in a recovery should intervention be disallowed is or may be diminished by reason of the adverse interest of the estate representative and the infant will certainly be bound by a judgment in the action.

Rule 24(a) (2) of the Rules of Civil Procedure mandates in a case such as this the right of intervention, for,

> "Upon timely application anyone shall be permitted to intervene in an action * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *"

In *U. S. v. C. M. Lane Lifeboat Co., Inc. et al.*, 25 F. Supp. 411, intervention was allowed where petitioner alleged conflicting interest and inadequacy of representation.

The Court held, as this Court should, that, whether or not petitioner for intervention could in his own right maintain the action,

> "The rule in question like all the rules of Civil Practice should be liberally interpreted. The provision quoted would seem to apply in this case, for a judgment against the insurance company though it would not directly bind the petitioner, would in the last analysis do so indirectly. Then too, there is something to be said for the inadequacy of the representation of his interest * * *"

Professor Moore in his commentary 4 Moore P. 38, indicates also that intervention should be allowed,

> "if the representative has or represents some adverse to that of the petitioner * * *"

The issue in intervention is not who is to be a proper party plaintiff, but rather whether a party directly interested in the outcome of the proceeding should be allowed to participate directly where the proper party plaintiff has or may have conflicting interests.

That the Court below, did not properly interpret the intention of the intervenor rule is apparent by a reading of the order of April 17th, 1961, wherein the Court stated,

> "The motion is denied on the ground that under the Jones Act and the Death on the High Seas Act the only person authorized to bring the action is the Administratrix * * *"

The issue below as contended by petitioner was not based upon who had the right to maintain the action, but rather whether the guardian of an infant whose rights are adverse to the proper parties plaintiff would be prejudiced

by a denial of a right of participation by way of intervention.

In *Sloan v. Appalachin Electric Power Co.*, 27 F. Supp. 108 (D. C. S. D. W. Va. 1939) intervention was allowed to the employer's insurance carrier in an employees' third party personal injury action, the Court indicating that not only would intervention not prejudice the parties, but indeed there would be a just settlement of the controversy in a single proceeding.

See also:

*Magee v. McNamy*, 10 F. R. D. 5, (U. S. D. C. W. D. Penn.).

In *Kozak v. Wells*, 278 F. 2d 104 (C. A. 8th Cir.) it was held that the Court below erred in denying intervention as a matter of right where the three essential conditions had been met, namely, (278 F. 2d 104, 109)

(1) That the application be timely,

(2) That the representation of the applicant's interest by existing parties is or may be inadequate, and

(3) That the applicant is or may be bound by a judgment in the action.

There is no question but that in the case at bar the application was timely and that judgment will bind the infant claimant.

As to element two, the Court of Appeals ably and properly interpreted the statute by holding that,

> "a positive showing that such representation is inadequate is not necessary. The rule requires only that it may be inadequate * * *"

All of the elements required by Rule 24 (a) (2) exist in this case.

The estate representative and her counsel can make no showing as a matter of law or fact that intervention will be prejudicial to a just outcome of the cause and assessment of proper amount of damages.

It is to the benefit of all parties that all parties be before the Court.

## CONCLUSION

**For all of the foregoing reasons a Writ of Certiorari as prayed for should be granted.**

Respectfully submitted,

MILTON GARBER,
*Attorney for Petitioner.*

*Counsel:*
KENNETH HELLER,
DONALD S. SHERWOOD.

# APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

60 Civ. 2067.

---

ANGELA ORONA, as Administratrix *de bonis non* of the Estate of Santiago Orona, deceased,

*Plaintiff.*

against

ISBRANDTSEN COMPANY, INC., UNITED MAIL STEAMSHIP COMPANY,

*Defendants.*

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## MEMORANDUM AND ORDER.

McGOHEY, J.

This is a suit brought under both the Jones Act and the Death on the High Seas Act, for the wrongful death of one Santiago Orona which allegedly occurred upon a vessel of the Defendants on or about May 11, 1959. This suit was originally commenced on May 24, 1960 by the Public Administrator appointed by the New York County Surrogate upon the petition of one Maria Luisa Cruz de Orona, who though claiming to have been the common law wife of the deceased and the mother of his infant son Mario Orona, waived her right to appointment as Administratrix.

Thereafter the New York Surrogate revoked the appointment of the Public Administrator on March 10, 1961 and appointed Angela Orona as Administratrix, after a contested hearing upon the latter's petition, which alleged that she was the lawful widow of the deceased.

*Appendix A.*

Angela Orona thereafter moved to be substituted for the Public Administrator as plaintiff in this suit. This motion was granted by an order dated March 15, 1961, which also directed Kenneth Heller, Esq., who had appeared as attorney for the Public Administrator, to turn over the pleadings, memoranda and other documents in this action to Sidney Schmukler, Esq., the attorney for the present plaintiff.

That order has not been complied with pending decision on the instant motion of Kenneth Heller, Esq., on behalf of the common law widow to have the latter named as a plaintiff in the present action. The ground for this motion is that there is obviously hostility and conflict of interest between the present plaintiff on the one hand and the common law widow and her son on the other.

The motion is denied on the ground that under the Jones Act and the Death on the High Seas Act the only person authorized to bring the action is the Administratrix who sues for the benefit of the beneficiaries named under those statutes. See Civil v. Waterman Steamship Corporation, 2 Civ. 217 F. 2d. 94, 98.

The substitution necessitates further discovery proceeding by the defendants. They are given permission to do so on condition that these are completed by May 25, 1961.

The case is adjourned to the top of the Ready Calendar for June 5, 1961.

So ordered.

Dated: April 17, 1961.

JOHN F. X. McGOHEY,
*U. S. D. J.*

*Appendix A.*

## ORDER.

## UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House; the City of New York, on the twenty-third day of October, 1961.

Present:

HON. CHARLES E. CLARK,
" STERRY R. WATERMAN,
" LEONARD P. MOORE.

A motion having been made herein by counsel for the plaintiff to dismiss the appeal of MARIA LUISA CRUZ de ORONA,

Upon consideration thereof, it is

ORDERED that said motion be and it hereby is granted.

FURTHER ORDERED that the appeal from the order of the United States District Court for the Southern District of New York be and it hereby is dismissed.

S. A. DANIEL FUSARO,
*Clerk.*

*Appendix A.*

## OPINION.

### UNITED STATES COURT OF APPEALS.

SECOND CIRCUIT.

Motion to dismiss the appeal is granted for lack of merit in the appeal. The Administratrix is legally bound to pursue the claims of the deceased's infant son for pecuniary benefits his due, and to protect his rights as the surviving child of the deceased under 46 U. S. C. 688.

Oct. 23, 1961.

C. E. C.
S. R. W.
L. F. M.
*U. S. C. J. J.*

### RULE 24 (a) (2) RULES OF CIVIL PROCEDURE

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . .